

1  
2  
3  
4 UNITED STATES DISTRICT COURT  
5 DISTRICT OF NEVADA

6 \* \* \*

7 SPER, INC.,

8 Appellant(s),

Case No. 2:16-CV-1996 JCM

Appeal Reference No: 16-45

9 v.

10 CAPRIATI CONSTRUCTION CORP, INC.,

11 Appellee(s).

12  
13 In re:

14 CAPRIATI CONSTRUCTION CORP., INC.

15 Debtor.

BK-S-15-15722-ABL

Chapter 11

ORDER

16  
17  
18 Presently before the court is an appeal of a bankruptcy court's order. Appellant Sper, Inc.  
19 ("Sper") has filed an opening brief. (ECF No. 5). Appellee Capriati Construction Corp., Inc.  
20 ("Capriati" or "debtor") filed an answering brief (ECF No. 7), to which appellant replied (ECF No.  
21 8).

22 **I. Background**

23 On October 7, 2015, Capriati filed a voluntary petition under Chapter 11, case number BK-  
24 S-15-15722-ABL. (ECF No. 5).

25 On June 29, 2016, Capriati filed a motion for sanctions against Sper for its refusal to appear  
26 for a properly notice deposition and responds to requests for production of documents. (ECF No.  
27 5-2 at 2).  
28

1 On July 19, 2016, the bankruptcy court conducted a hearing on Capriati's motion for  
2 sanctions and construed the motion as a motion "to compel certain discovery in anticipation of a  
3 continued confirmation hearing." (ECF Nos. 5-8 at 27; 5-10). On July 21, 2016, the bankruptcy  
4 court entered an order granting in part Capriati's motion, ordering, in relevant part, as follows:

5 **IT IS FURTHER ORDERED** that, to the extent the Motion seeks to compel  
6 discovery in the form of attendance at a deposition, the Motion is **GRANTED as**  
7 **follows:**

- 8 • The person most knowledgeable for Sper shall make himself or herself available  
9 for, and shall appear to testify at, a deposition conducted by Debtor's counsel.
- 10 • The deposition may be taken, at the discretion of Debtor's counsel, either via  
11 telephone or via travel to Jackson Hole, Wyoming, and **shall be completed on**  
12 **or before 5:00 p.m. prevailing time on Friday July 29, 2016.** Counsel to  
13 make appropriate arrangements.

14 **IT IS FURTHER ORDERED** that Sper shall bear costs incurred in connection  
15 with the deposition ordered herein.

16 (ECF No. 5-10 at 3-4).

17 In the instant appeal, appellant appeals the bankruptcy court's order on a motion to compel  
18 discovery. (ECF No. 5).

## 19 **II. Legal Standard**

20 Jurisdiction over an appeal from an order of a bankruptcy court is governed by 28 U.S.C.  
21 § 158. *In re Rains*, 428 F.3d 893, 900 (9th Cir. 2005). A district court has jurisdiction to hear  
22 appeals from "final judgments, orders, and decrees . . . and, with leave of the court, from  
23 interlocutory orders and decrees, of bankruptcy judges." 28 U.S.C. § 158(a); *In re Rains*, 428 F.3d  
24 at 900.

25 The district court reviews a bankruptcy court's conclusions of law, including its  
26 interpretation of the bankruptcy code, on a *de novo* basis. *In re Rains*, 428 F.3d at 900; *In re*  
27 *Maunakea*, 448 B.R. 252, 258 (D. Haw. 2011). Findings of fact are reviewed for clear error.  
28 *United States v. Hinkson*, 585 F.3d 1247, 1260 (9th Cir. 2009).

The court reviews for an abuse of discretion the imposition of discovery sanctions.  
*Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1156 (9th Cir. 2003). The bankruptcy  
court abuses its discretion when it fails to identify and apply "the correct legal rule to the relief  
requested," or if its application of the correct legal standard was "(1) 'illogical,' (2) 'implausible,'

1 or (3) without ‘support in inferences that may be drawn from the facts in the record.’” *United*  
2 *States v. Hinkson*, 585 F.3d 1247, 1262–63 (9th Cir.2009) (*en banc*).

### 3 **III. Discussion**

4 As an initial matter, the court appears to lack jurisdiction over the instant appeal. A district  
5 court has jurisdiction to hear appeals from interlocutory orders, as here, only with leave of the  
6 bankruptcy court. Sper appeals the bankruptcy court’s interlocutory order granting Capriati’s  
7 motion to compel certain discovery in anticipation of a continued confirmation hearing, but has  
8 failed to show, or even allege, that the bankruptcy court granted Sper leave to proceed with the  
9 instant appeal. Assuming, *arguendo*, that the court has jurisdiction, Sper’s appeal nonetheless fails  
10 on the merits.

11 In the instant appeal, Sper sets forth five (5) issues on appeal: (1) whether the bankruptcy  
12 court erred in ordering the deposition of counsel for Sper; (2) whether the bankruptcy court erred  
13 in imposing deposition costs against Sper without just cause; (3) whether the bankruptcy court  
14 erred in imposing deposition costs against Sper based on the physical incapacity to attend the  
15 deposition; (4) whether the bankruptcy court erred in its inconsistent and/or lack of factual findings  
16 to justify the shifting of deposition costs to Sper; and (5) whether the bankruptcy court erred in  
17 imposing deposition costs against Sper when no travel expenses were incurred. (ECF No. 5 at 11).

18 Sper’s arguments lack merit and are unsupported by the record. The bankruptcy court did  
19 not order the deposition of counsel for Sper or impose deposition costs without cause. Nor did the  
20 bankruptcy court lack factual findings to justify shifting deposition costs to Sper.

21 According to the transcript from the July 19th hearing, the bankruptcy court ordered, in  
22 relevant part, as follows:

23 The person most knowledgeable to substantiate those claims will make themselves  
24 available in advance of confirmation or deposition. . . . And the person who will  
25 appear will be the person most knowledgeable for SPER, Inc. The choice is SPER’s  
as to who they will produce for the purposes of that deposition, but they will be  
deposed.

26 (ECF No. 5-8 at 31–32). Thereafter, it was Sper’s counsel, Ms. Frankewich, who confirmed she  
27 was the person most knowledgeable. (ECF No. 5-8 at 36).

Moreover, the bankruptcy had cause to impose deposition cost against SPER. The bankruptcy court explicitly stated that “the cost of the deposition will be borne by SPER in connection with this matter **for failure to appear previously in connection with this deposition.**” (ECF No. 5-8 at 38) (emphasis added).

Further, in light of Ms. Frankewich's inability to travel based on medical reasons (ECF No. 5-8 at 36), the bankruptcy court allowed debtor's counsel to take the deposition either by telephone or debtor's counsel can fly to Ms. Frankewich in Wyoming. (ECF No. 5-8 at 38, 41–42).

Furthermore, no travel costs were borne by Sper as the deposition was eventually completed telephonically. (ECF No. 7 at 14). In fact, Sper acknowledges that Capriati has yet to seek deposition costs from Sper, rendering Sper's argument premature at best. (*See* ECF No. 8 at 5 (Capriati does not address in their Answering Brief whether it will or will not seek reimbursement from SPER and/or its counsel for actual costs associated with the court reporter and/or videographer for the PMK deposition.'')).

In light of the foregoing, the court finds that the bankruptcy court did not abuse its discretion in imposing deposition costs on Sper for Sper's failure to appear previously in connection with the underlying deposition at issue. Accordingly, the court will affirm the bankruptcy court's order.

## IV. Conclusion

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that the bankruptcy court's order be, and the same hereby is, AFFIRMED.

DATED April 19, 2017.

James C. Mahan  
UNITED STATES DISTRICT JUDGE